

November 5, 2019

The Massachusetts General Court
Joint Committee on Financial Services
24 Beacon St, Boston, MA 02133

**RE: Massachusetts State Retirement Savings Program – Proposed Bills – HB.1075,
HB.1076, HB.1103, SB.574, SB.602**

Dear Members of the Joint Committee on Financial Services:

The ERISA Industry Committee (“ERIC”) is writing to submit comments regarding proposed bills HB.1075, HB.1076, HB.1103, SB.574, and SB.602 to reinforce the importance of ensuring that the proposed state retirement savings program conforms with the preemption protection afforded by federal law—the Employee Retirement Income Security Act of 1974 (“ERISA”)—and does not impose benefit, reporting, or administrative requirements on employers already sponsoring a retirement plan.

I. ERIC’s Interest in the Proposed Legislation

Representing companies that voluntarily offer retirement benefits to workers across the country, ERIC is committed to the financial security of millions of Americans who are facing retirement or have already entered into retirement. ERIC supports proposals and programs run by states and localities designed to promote and facilitate retirement saving by those who are not covered by an employer plan. However, it is critical that these programs avoid placing any burden on employers that already voluntarily offer a qualified retirement plan regulated by federal ERISA law. ERIC members’ retirement plans generally do not utilize a one-size-fits-all approach to enrollment timeframes, eligibility criteria, auto-enrollment features, or company contribution formulas. These plans comply with ERISA and should not be subject to state and local rules regarding eligibility, reporting, and enrollment of plan participants. We have concerns with the proposed bills, as currently drafted, and how they overlap and connect with federal law that already governs the administration of private-sector retirement plans.

ERIC is the only national association that advocates exclusively for the nation’s largest employers on health, retirement, and compensation public policies at the federal, state, and local levels. ERIC member companies—employers that have more than 10,000 employees—are leaders in every sector of the economy, with employees in every state and locality in the nation. These companies offer employee benefits to millions of workers and families across the country, and promote retirement savings, financial wellness, and health care value improvements and cost savings. ERIC advocates for public policies that support the ability of large employers to offer benefits effectively and efficiently under the federal regulatory framework of ERISA. We

strongly encourage you to revise the proposed bills to ensure that no additional burdens are imposed on employers that are already providing a qualified retirement plan to employees.

II. Summary of Comments

The following is a summary of ERIC's comments, which are set forth in greater detail below:

- The proposed bills should provide a complete exemption for all employers that offer a retirement plan under ERISA and not base the exemption on the definition of an “eligible employee” or “covered employee”.
- In the alternative to a complete exemption based on sponsoring a retirement plan, the definition of an “eligible employee” or “covered employee” should be amended to conform with the employee eligibility requirements under ERISA. Such coordination includes setting the eligibility age at 21 and allowing employers to limit participation in the retirement plan to employees who do not exceed 1,000 hours of service in a year.
- Any program created by the proposed bills should also exempt employers that provide a retirement plan to employees in accordance with ERISA from all reporting requirements.

III. ERIC Recommendations

The proposed bills should provide a complete exemption for all employers that offer a retirement plan under ERISA and not base the exemption on the definition of an “eligible employee” or “covered employee”. ERISA enables employers to tailor voluntary retirement plans that meet the needs of their workforce and sets forth rules at the federal level that employers must follow. The U.S. Department of Labor recognizes that “ERISA preempts state and local laws that: (1) mandate employee benefit structures or their administration; (2) provide alternative enforcement mechanisms; or (3) bind employers or plan fiduciaries to particular choices or preclude uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself.”¹ ERISA's broad preemption of state and local laws that relate to employer-sponsored employee benefit plans is intended to serve as a source of uniform administration. For employers that operate in multiple states and cities, ERISA preemption is critical to the ability to provide uniform and consistent benefits across an employer's workforce. Therefore, ERIC recommends that the proposed bills provide a complete exemption for employers operating an ERISA-covered plan.

The following language, which is currently included in the text of HB.1103, adequately provides such a complete exemption:

¹ 80 Fed. Reg., at 72007, citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers*, 514 U.S. 645, 658 (1995); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990); *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 14 (1987).

"Employer" means a person or entity engaged in a business, industry, profession, trade, or other enterprise in Commonwealth of Massachusetts, whether for profit or not for profit, that (i) has at no time during the previous calendar year employed fewer than 25 employees in the State, (ii) has been in business at least 2 years, and (iii) has not offered a qualified retirement plan, including, but not limited to, a plan qualified under Section 401(a), Section 401(k), Section 403(a), Section 403(b), Section 408(k), Section 408(p), or Section 457(b) of the Internal Revenue Code of 1986 in the preceding 2 years.

ERIC recommends that the other proposed bills, or any subsequent legislation on this subject, be amended to include similar language that completely exempts employers that offer a retirement plan under ERISA.

In the alternative to a complete exemption based on sponsoring a retirement plan, the definition of an “eligible employee” or “covered employee” should be amended to conform with the employee eligibility requirements under ERISA. Retirement plan eligibility requirements are a clear area of core ERISA concern. ERISA section 202(a) requires an employer to not restrict eligibility for the retirement plan beyond one year of service (1,000 hours in a year) and attainment of age 21. Within this framework, each employer determines eligibility criteria based on the unique culture of the company and the market practices within the employer’s industry or region. In many instances, eligibility to enroll in a retirement plan will coincide with the ability to receive employer contributions to the retirement plan.

As currently drafted, all five proposed bills define “employee”, “eligible employee”, or “covered employee” as an employed individual who is 18 years of age or older. Bills HB.1076 and SB.574 further qualify these definitions to include employed individuals who have provided, or are expected to provide, 750 or more hours of service through their employment in a calendar year. Such requirements would not only circumvent employee benefit structures that follow ERISA, but also, by binding employers to particular plan features, would function to regulate ERISA plans. These standards conflict with the provisions of ERISA that allow employers to exclude employees from the employer’s retirement plan if the employee is less than age 21 or works less than 1,000 hours in a year. To assist those employers that currently sponsor a tax-qualified retirement plan that is subject to ERISA from being subject to different rules in different states and cities, and to ensure that the Massachusetts proposals do not violate federal law, we respectfully request that the Joint Committee on Financial Services exclude employers that sponsor plans with eligibility conditions that comply with ERISA from the requirement to facilitate the city’s plan.

If the proposed bills were to pass as is, confusion would ensue as to whether employers that sponsor a tax qualified retirement plan are able to receive an exemption if they limit participation until attainment of age 21. In addition, some employers that sponsor a retirement plan limit immediate eligibility to workers who have not satisfied an hours of service

requirement (seasonal or temporary); similarly, plans may exclude collectively bargained employees unless their bargaining unit negotiates for their participation in the plan. A plan sponsor of a federally regulated retirement plan should not be forced to alter their plan to increase coverage to other groups of employees (i.e. temporary or seasonal workers who work less than 1,000 a year or collectively bargained employees whose bargaining unit does not bargain for participation) to avoid being included in a state-run program. Similarly, plan sponsors already offering a federally regulated retirement plan should not be forced to auto-enroll employees into a city or state-run plan.

ERIC requests that any program created by the proposed bills exempt employers that provide a retirement plan to employees in accordance with ERISA from all reporting requirements. Several state jurisdictions have attempted to implement rules that require an employer that provides a retirement plan to report to the state that such a plan is provided to employees, or otherwise apply for an exemption from the state-run plan. We believe these requirements are a clear violation of ERISA preemption principles and have objected to these program rules. In fact, we brought a federal lawsuit on behalf of ERIC member companies in 2017 against the Oregon Retirement Savings Board over its reporting requirement and reached a favorable settlement that relieves ERIC member company employers from these reporting requirements. In 2019 we entered into a Memorandum of Understanding with the Illinois Secure Choice Program establishing a similar exemption for ERIC member companies from its employer reporting requirements. We are willing to work with you to craft exemptions and to provide recommendations, using current available data, that will assist the program in determining which employers already provide a retirement plan.

IV. Conclusion

ERIC shares your goal of increasing retirement savings access to employees who are employed by an employer that does not provide a retirement plan. However, for employers that already provide a retirement plan in compliance with federal ERISA law, it is important that they be able to design and operate plans that work effectively and efficiently based on the needs of their workforces and the industries in which they operate.

ERIC appreciates the opportunity to provide comments on your proposal and welcome future discussions on this matter. If you have any questions concerning our comments, or if we can be of further assistance, please contact me at (202) 627-1930 or arobinson@eric.org.

Sincerely,



Aliya Robinson
Senior Vice President, Retirement and Compensation Policy